77-1380

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES HEPPERLE,

Plaintiff-Appellant,

v.

ROY RICKS, ET AL.,

Defendants-Appellees.

JAMES HEPPERLE,

Plaintiff-Appellant,

v.

ALFRED MCLEOD, ET AL.,

Defendants-Appellees.

Number _____

JURISDICTIONAL STATEMENT

James Hepperle, Pro Se
Rt. 1 Box 1990
Santa Rosa Beach, Fl. 32459
904/267-2394

Jurisdictional Statement

This appeal to the Supreme Court of the U. S. concerns the Fifth Circuit's December 27, 1977 dismissal of my appeal, appended. It involves violations of the anti-trust laws, especially Sections I and II of the Sherman Act, the 14th Amendment, 28 USC Sec. 144, and the FRCP.

Notice of Appeal is being served simultaneously with this Jurisdictional Statement and with a Motion for Leave to File Appeal. See appended facsimile of the Notice of Appeal.

I allege that the defendants-appellees boycotted me similarly to the boycotts in Silver v. N. Y. Stock Exchange, 373 U. S. 341 (1963), and Ricci v. Chicago Mercantile Exchange, 447 F. 2d 713; that the district judge refused to read most

of my pleadings and dismissed a motion which he admitted he hadn't even read, and that he violated the FRCP and 28 USC Sec. 144; and that the Fifth Circuit dismissed my appeals without even reading my appeal briefs and wrongly assessed costs. I contend that the Fifth Circuit's dismissal of my appeals is not only contrary to the anti-trust decisions of the Supreme Court of the U. S. but is also a violation of the 14th Amendment due-process guarantee.

May a district and circuit court violate the FRCP and 28 USC Sec. 144, and rule contrary to the anti-trust decisions of the Supreme Court of the U. S. even though the plaintiff is a non-lawyer pro se person?

The appellee chambers of commerce arbitrarily expelled me without due process

similarly to Silver v. N. Y. Stock Exchange and Ricci v. Chicago Mercantile Exchange. I sued. The district judge read only my complaints and refused to read most of my other pleadings, though he read everything my attorney adversaries wrote. For example, I filed an extremely detailed motion showing that an attorney had falsely, with intent to deceive, filed an answer to another motion; analysis of my motion would have required hours, yet the district judge dismissed it without reading it (and even admitted he hadn't read the motion he was dismissing!). I moved for his recusal under 28 USC Sec. 144, but he falsely ruled that I had moved for him to recuse himself (although 28 USC Sec. 144 is for one judge's recusal by another judge), and, although the accompanying affidavit was sufficient to

require him to turn the motion over to another judge for ruling, he himself dismissed the motion for his recusal and then dismissed my suits (which is what 28 USC Sec. 144 is designed to prevent).

I appealed to the Fifth Circuit, and, when the Fifth Circuit published a malicious attack on me in another case, in preparation for appeal to the Supreme Court I moved for recusal of certain circuit judges. When the Fifth Circuit dismissed my appeals, I filed a "Motion to Strike Judgment of December 27, 1977" on the grounds that the Fifth Circuit's refusal to read my appeal brief voided the dismissal of my appeal, and an "Objection to Appellees' 'Bill of Costs'" on the grounds that the costs were excessive and that an appellee had failed to comply with the FRCP.

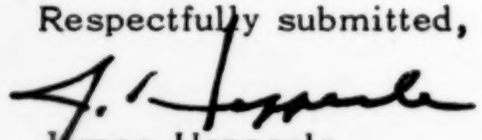
The Fifth Circuit ignored my "Motion for Disqualification" and "Objection to Appellees' 'Bill of Costs'" and one of the circuit judges I had moved to recuse dismissed my "Motion to Strike Judgment of December 27, 1977."

The question is substantial because it involves flagrant disregard of the Supreme Court's anti-trust decisions, 28 USC Sec. 144, the FRCP, and the 14th Amendment due-process guarantee. The defendants and their lawyers and the district and circuit courts have run amok because I am a non-lawyer pro se plaintiff. Are even non-lawyer pro se plaintiffs entitled to a fair trial and appeal, or is playing with them to give a semblance of justice sufficient? Should courts treat non-lawyer pro se plaintiffs the same way a Negro who was suing a white man would have been

treated a hundred years ago? Is it time for non-lawyer pro se plaintiffs to be accorded equal rights, not only in theory but in fact? Should judicial obstruction of justice be condoned?

This Jurisdictional Statement is printed in accordance with 39(4) of the Rules of the Supreme Court.

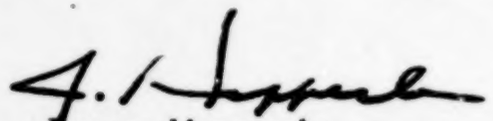
Respectfully submitted,



James Hepperle
Rt. 1 Box 1990
Santa Rosa Beach, Fl. 32459
904/267-2394

Certificate

I am today, March 23, 1978, mailing three copies of this to C. LeDon Anchors, P. O. Drawer F, Ft. Walton Beach, Fl. 32548, and to Donald H. Partington, P. O. Box 12585, Pensacola, Fl. 32573



James Hepperle

Appendix

filed March 27, 1978

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES HEPPERLE,

Plaintiff-
Appellant,

v.

ROY RICKS, ET AL.,

Defendants-
Appellees.

NO. 77-1754

JAMES HEPPERLE,

Plaintiff-
Appellant,

v.

ALFRED MCLEOD, ET AL.,

Defendants-
Appellees.

NO. 77-2036

NOTICE OF APPEAL

Notice is hereby given that I, James Hepperle, plaintiff-appellant above named, hereby appeal to the Supreme Court of the U. S. from the dismissal of my appeal to the Fifth Circuit entered in this action on the 27th day of December, 1977.

This appeal to the Supreme Court concerns alleged violations of the anti-trust laws, especially Sections I and II of the Sherman Act, the 14th Amendment, 28 USC Sec. 144, and the FRCP.

James Hepperle, Pro Se
Rt. 1 Box 1990
Santa Rosa Beach, Fl. 32459
904/267-2394

Certificate

I am today, March 23, 1978, mailing a copy of this to C. LeDon Anchors, P. O. Drawer F, Ft. Walton Beach, Fl. 32548, and to Donald H. Partington, P. O. Box 12585, Pensacola, Fl. 32573.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1754
Summary Calendar*

JAMES HEPPERLE,

Plaintiff-Appellant,

versus

ROY RICKS, ET AL.,

Defendants-Appellees.

NO. 77-2036
Summary Calendar*

JAMES HEPPERLE,

Plaintiff-Appellant,

versus

ALFRED MCLEOD, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Florida

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*Rule 18, 5 Cir.; see Isabell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F. 2d 409.

(December 27, 1977)

BEFORE GOLDBERG, CLARK AND FAY, Circuit Judges.

PER CURIAM:

On our own motion, we have consolidated these two appeals which raise related issues. We have carefully evaluated appellant's several contentions which may be summarized: (1) whether the complaints state a cause of action and (2) whether the district judge should have recused himself. After careful review of the briefs, the record on appeal and the applicable authorities, we conclude that the district court judge was correct in dismissing the complaints for the reasons stated in his two Orders. The issue appellant raises concerning recusal has no merit for the reasons explained in Hepperle v. Carlos Well Supply Co., Nos. 77-1755 and 77-1907 (5th Cir. October 6, 1977).

For these reasons, the judgments are AFFIRMED.[1]

1/ Given our disposition of this appeal, we deem it unnecessary to decide the pending Motion to Strike Appellant's Brief which was carried with the case.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JAMES HEPPERLE,
Plaintiff,

vs. PCA NO. 76-152

ROY RICKS,
Defendants.

ORDER

Before the court is plaintiff's fourth motion for summary judgment. Timely notice of appeal having previously been filed, this court is without jurisdiction to consider such motion. Ruby v. Sec. of U. S. Navy, 365 F. 2d 385, 388 (9th Cir. 1966).

Therefore, it is,

ORDERED: Plaintiff's fourth motion for summary judgment is hereby denied without prejudice to his right again to seek such relief in the event of reversal of this case on appeal.

DONE AND ORDERED this 24th day of May, 1977.

WINSTON E. ARNOW
Chief Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JAMES HEPPERLE,
Plaintiff,

vs.
ALFRED McLEOD, et al.,
Defendants.

PCA 77-0434

JUDGMENT

Pursuant to and at the direction of the Court,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that this action be dismissed without prejudice as to Counts Two and Three, and that this action be dismissed at plaintiff's cost.

Dated at Pensacola, Florida this 19th day of July, 1977, nunc pro tunc as of May 12, 1977.

MARVIN S. WAITS, Clerk

By: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JAMES HEPPERLE,
Plaintiff,
vs. PCA 76-152
ROY RICKS AND GREATER
FORT WALTON BEACH
CHAMBER OF COMMERCE,
Defendants.

ORDER

Before the court is motion of defendant, Greater Fort Walton Beach Chamber of Commerce, to dismiss the second amended complaint filed herein.

On April 5, 1977, plaintiff filed notice of appeal "from Judge Arnow's refusal to comply with Rule 28, Section 144 . . . ," referring to this court's order of March 23, 1977 denying plaintiff's motion for recusal made pursuant to 28 U.S.C. Sec. 144. Determination by a district judge not to disqualify himself is not reviewable on appeal until final judgment or other appealable order has been entered in the case. Dubnoff v. Goldstein, 385 F. 2d 717, 721 (2d Cir. 1967); Albert v. U. S. District Court for W. D. of Michigan, 283 F. 2d 61 (6th Cir. 1960), cert. den. 365 U.S. 828 [sic] (1961). The improvident taking of an appeal cannot effectively destroy the authority of the court below to proceed upon motions properly before it. Ruby v. Secretary

of U. S. Navy, 365 F. 2d 385, 388 (9th Cir. 1966). See also Brotherhood of Locomotive Firemen and Enginemen v. Seaboard Coast Line Railroad Co., 413 F. 2d 19, 23 (5th Cir. 1969). The instant motion is, therefore, properly before the court for disposition.

After setting forth certain factual matter, Count One of the complaint states:

> I allege an organized refusal to deal and a boycott under Section I of the Sherman Act; a horizonal restraint; [sic] an agreement to exclude me as a competitor; [sic] under Section I of the Sherman Act as a restraint of trade and under Section II as a conspiracy to monopolize; an unlawful restraint of trade which is injurious to the public.

On motion to dismiss, the court must interpret the complaint in the light most favorable to the pleader, but that does not mean the court must find allegations of ultimate fact in conclusionary pleading. Klor's, Inc. v. Broadway-Hale Stores, Inc., 255 F. 2d 214, 232 (9th Cir. 1958) rev'd on other grounds, 359 U.S. 207 (1959).

Insofar as the complaint attempts to allege a per se violation of 15 U.S.C. Sec. 1, the rule is that certain now classic forms of distorting market conditions -- price fixing, group boycotts, market allocation, restrictive practices involving patents, and certain competition-preclusive conduct by monopoly groups are now recognized as being illegal per se; no assessment of their actual effect is required because it is assumed that the practice

is inherently subversive of competition. On the other hand, analysis of market power as opposed to effect is required for most per se violations although not for price fixing; in this latter unique realm anti-competitive purpose, without more, has been said to be sufficient to invoke the sanctions associated with Section 1 violations. George R. Whitten, Inc. v. Paddock Pool Builders, Inc., 508 F. 2d 547, 559 (1st Cir. 1974). Therefore, since price fixing is not here involved, in addition to (1) the existence of an agreement, combination or conspiracy; (2) the use of unfair methods of competition as a part thereof; and (3) the requisite intent, the market power of the defendants must be included as a fourth element of a per se violation of Section 1. Tower Tire & Auto Center, Inc. v. Atlantic Richfield Co., 393 F. Supp. 1098, 1108 (S.D. Tex. 1975). There is no such allegation in this complaint. Although, as pointed out by defendants, plaintiff has not defined or attempted to define the relevant market, it does not appear that either defendant could be alleged to be a significant factor in any defined market affecting plaintiff's business activities.

The court has considered the cases of Silver v. N.Y. Stock Exchange, 373 U.S. 341 (1963) and Ricci v. Chicago Mercantile Exchange, 447 F. 2d 713 (7th Cir. 1971) aff'd 409 U.S. 289 (1973), which bear some factual similarity to the instant case. In those cases, the defendants plainly enjoyed the power to effectively deny potential competitors access to the market. Such is not the case here.

Since plaintiff has not and, apparently, cannot allege a per se violation of Section 1, the court must consider whether the matters alleged constitute an unreasonable restraint of interstate

trade or commerce. Harrison v. Prather, 435 F. 2d 1168, 1175 (5th Cir. 1970), cert. den. 404 U. S. 892 (1971). Contrary to defendant's assertion in memorandum, the gist of plaintiff's complaint is apparently that he was "kicked out" of the Chamber and not that the Chamber refused to admit him to membership. The courts may review the expulsion of a member of an association in certain circumstances. 6 Am. Jur. 2d, Associations and Clubs, Sec. 37. However, even if plaintiff were improperly "kicked out," this would not necessarily constitute an antitrust violation. In this case, as in Whitten and Harrison, the conduct alleged could not have resulted in any appreciable effect upon interstate commerce or trade so as to constitute an unreasonable restraint thereof.

Respecting alleged violation of 15 U.S.C. Sec. 2, there must be shown an intent to monopolize and a pattern of activity creating a dangerous probability of monopolization. Whitten at 554. No such allegations appear in the complaint and, further, from the matters alleged, it does not appear the requirements can be satisfied in this case.

In paragraph VIII of the complaint, plaintiff incorporates by reference the attachments to his original complaint, which consist [sic] of an affidavit, copies of letters and brief in support of complaint. As pointed out in this court's order of December 16, 1976, such matters do not comply with the rules of pleading as set forth in Rule 8 (a) and (e), Federal Rules of Civil Procedure. Nevertheless, even if properly pled, the matters in the attachments could not cure the defects in the complaint.

Plaintiff has made no response to the

motion to dismiss. Nevertheless, in an abundance of caution, the court has carefully considered the merits of the motion and concludes the second amended complaint, as did the prior complaints, fails to state a claim for violation of 15. U.S.C. Sections 1 and 2. Since plaintiff has twice been afforded leave to amend, it appears no useful purpose would be served by granting further leave to amend.

County Two of the complaint alleges violation of Chapter 542 of the Florida Statutes and Count Three alleges tortious interference with advantageous contractual relationship. There being no diversity of citizenship, these counts must be dismissed for lack of jurisdiction. 28 U. S.C. Sec. 1332.

Although the same attorneys have filed appearance for defendant, Roy Ricks, the motion to dismiss is filed only for defendant, Greater Fort Walton Beach Chamber of Commerce. This may reflect inadvertence by the attorneys. In any event, what is set forth herein is equally applicable to defendant, Roy Ricks, and the court concludes that the order hereby entered should be applicable both to him as well as to the defendant for whom such motion was filed.

Accordingly, it is,

ORDERED:

1. Motion of defendant, Greater Fort Walton Beach Chamber of Commerce, to dismiss is hereby granted.

2. This cause is hereby dismissed respecting both defendants and at plaintiff's cost, with, insofar as Count One is concerned, it being dismissed with prejudice, and, with, insofar as Counts Two and Three are concerned, it being without prejudice.

DONE AND ORDERED this 27 day of April, 1977.

WINSTON E. ARNOW
Chief Judge